Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of Rape Victim's Character for Chastity

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The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Oliver Wendell Holmes

The evolution of criminal law and the rules of procedure and evidence used in its enforcement provide no exception to Holmes’ perception. In accord with current assumptions and social biases the law has punished activities earlier thought harmless; has established safeguards once thought unnecessary; and has excluded evidence long thought admissible. The process is often a slow one: it takes time for the law to rethink policies long settled, and it takes a longer time for it to discard them. Yet the process is a necessary one, essential to the growth and currency of the law.

One rule of law in need of such reevaluation is the rule at common law holding admissible in a trial for forcible rape evidence of the prosecutrix’ reputation for consensual sexual activity when a defense of consent is interposed.

The law in Illinois, and in most other common law states, is well-settled on this point. An accused rapist, asserting that the prosecutrix consented to the sex act in question, may introduce evidence of her “bad character for chastity” as tending to show the probability that she did so consent. Many prosecutors, as well as feminist

3. This evidence is limited to general evidence of her character only; evidence of specific instances of her sexual activity with other than the accused is not admissible. People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); People v. Eilers, 18 Ill. App. 3d 213, 309 N.E.2d 627 (1974).

The introduction of all such evidence is contingent on the existence of a viable question as to the prosecutrix’ consent. It is not error to exclude it if the consent defense is insubstantial, no better than a “weak alternative defense.” See People v. Cox, 383 Ill. 617, 622, 50 N.E.2d 758, 760 (1943). See also People v. Gabler, 111 Ill. App. 2d 121, 249 N.E.2d 340 (1969).
groups, have criticized this rule, arguing that it is counterproductive in two senses. First, it serves to dissuade reports and prosecutions of the crime, since the rape victim is aware that her reputation will be closely scrutinized by the court and that she will be subject to lengthy and often embarrassing cross-examination by defense counsel. Second, the rule often makes impossible the conviction of rapists whose victims, consistent with the changed moral standards of our time, have exercised their right to engage in premarital sex.

The concern of this article is the value of and need for this rule in today's legal system. To examine and evaluate its current use and function, it is necessary to consider the rule's development and its underlying bases and assumptions. Additionally, it is essential to weigh the probative value of the evidence admitted under its auspices in light of its prejudicial and inflammatory side-effects and to discuss the rights of the accused and the constitutional implications of any proposal for change.

DEVELOPMENT OF THE RULE: BASES AND ASSUMPTIONS

The rule evolved in a legal tradition supremely conscious of Lord Matthew Hale's admonition that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent" and in a male-dominated society suspicious of female motivations.

Accordingly, generations of jurists and legal scholars, humanly susceptible to the attitudes prevalent in a male-dominated society, have remained stubbornly suspicious of charges of rape, especially in cases in which the woman has escaped without serious visible injury. Legal commentators and law enforcement authorities have posed as a keystone of its reasoning that rape is particularly subject to false accusation the following analogy:

[There are special inducements to make such charges, which do not apply in other crimes. Thus a man's automobile may be stolen. He is ordinarily under no inducement to hide the fact of a theft or to accuse an innocent person. If, on reasonable suspicion he has made an accusation, he will generally have no ground to desire a]

4. Indeed, the Fourth Circuit has held that failure by defense counsel to investigate the character of the complainant in a rape case constitutes ineffective assistance of counsel. Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).
5. M. Hale, Pleas of the Crown 635 (1736) [hereinafter cited as Hale].

"Heaven has no rage like loved turned to hatred, nor hell a fury like a woman scorned."
8. See, e.g., Puttkamer, Consent in Rape, 19 Ill. L. Rev. 410 (1925). It is noteworthy that this article poses as a keystone of its reasoning that rape is particularly subject to false accusation the following analogy:

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alike, insisting that many rape reports are contrived by malicious or hysterical women, have established stringent procedures by which a false accuser can be unmasked. English courts since the time of Lord Hale have been urged to be wary of false accusations:

I only mention these instances [of false accusation], that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.11

conviction, should it appear that the defendant is innocent. His reputation will not suffer if the jury is not convinced of the defendant's guilt or concludes that the defendant honestly believed he had the prosecutor's consent. In a rape charge all these considerations are reversed. If the commission of a sexual act becomes known, the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. If thereafter a man is put on trial she has every selfish inducement to bring about his conviction, as every ground of acquittal except possibly mistaken identity would involve a reflection on her. In short, point for point, the conclusion is the direct opposite of that just reached in the case of the stolen automobile. Id. at 421-22. What Puttkamer failed or refused to note, however, is that the parallel he establishes is inaccurate, even assuming its psychological underpinnings are correct. The automobile has been stolen in his hypothetical; the woman has not been raped. Making perfect his analogy, let us assume that the auto was not stolen: in a fit of drunken generosity, Puttkamer's hypothetical man has given his car to a barroom acquaintance. May he not also be "impelled by many motives of self-interest to assert that the act were done criminally"?

9. Police reports are filled with suspicions about rape from police literature. Chapters on rape investigations are always preceded by a cautioning to suspect the victim of falsehoods. No other offense has this suspicion-based prejudicing of the officer's objectivity.

Testimony of Greg Conner, a police training officer at the University of Illinois. Transcript of the Hearing of the Illinois House of Representatives Rape Study Committee in Downers Grove, Illinois, February 9, 1974 at 108. [hereinafter cited as Rape Study Hearing]. (A copy of the pertinent portions of this transcript is on file with the Loyola University of Chicago Law Journal Office.)

10. Police operations are again reversed in dealing with the victims of rape. Interview is exchanged for interrogation. The woman can be raped twice, by the offender and later by the police, psychologically. Lie detector tests are structured into police policy and procedures to weed out falsehoods and to further increased suspicion and increased rationalization. I think that, in two cases I know of specifically, in the counties, in Peoria County and in Champaign County, women before their report is accepted, must submit to a polygraph test.

Id.

11. HALE, supra note 5, at 636. Both this passage and that quoted in the text accompanying note 4 supra, arose in the context of Lord Hale's consideration of whether "a child under twelve years old . . . may be admitted to give evidence. . . ." id. at 634. Consistent misapplication of these passages has, however, effectively expanded their usage to the nature of all rape charges and the credibility of all complainants in rape cases. See, e.g., Mills v. U.S., 164 U.S. 644 (1897).
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In order to guard against this perceived likelihood of unjust convictions, English courts, thinking to show the probability of the prosecutrix' consent, have long held that "evidence that the woman had a bad character previous to the supposed commission of the offense is admissible." While evidence of specific instances of the prosecutrix' previous sexual experience was admitted in a few early cases, the courts eventually came to admit only general evidence of the woman's character for chastity. The reasoning underlying this limitation was that the prosecutrix should not be forced to defend her reputation against myriad specific allegations of misconduct and that the encouragement of such sideshows would introduce too many collateral issues, detracting from the trial itself. This permitted the prosecutrix to deny accusations of any particular instances of sexual activity with other than the accused on cross-examination; this denial would remain unrebutted as to such specific acts. Evidence of her bad character for chastity, however, will always be allowed if the defendant has put forth as a credible defense an allegation of her consent.

The rule developed almost simultaneously in the American courts. An 1838 New York case expounded it with gusto:

"Are we to be told that previous prostitution shall not raise . . . a doubt of assent? That the triers should be advised to make no distinction between a virgin and a tenant of the stew? Between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex?"

That case proceeded to deplore and reject the emerging English rule prohibiting the introduction of evidence of specific instances of the prosecutrix' sexual activity. Most American jurisdictions, however, chose not to depart from the English movement and permitted the introduction of general evidence of the prosecutrix' moral character only.

18. 2 Wigmore §200 (Supp. 1974).
The earliest Illinois Supreme Court case addressing the question announced without hesitation its intent to follow in the common law tradition:

It is the general rule that the character of the prosecutrix may be impeached, but this must be done by means of general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity.19

Illinois law has remained singularly constant on this point, as has the law of nearly all common law jurisdictions.20 Because the law is so well-settled and little subject to criticism, few cases concerning only the admissibility of such evidence have been heard by the Illinois appellate courts in recent times.21

A REEVALUATION

Changing social awareness compels a reexamination of many long-accepted practices and a careful analysis of the premises upon which the law is established. The rule in question developed during an era in which both society and the law zealously protected women; when the rape of a "coy and modest female, severely chaste and instinctively shuddering at the thought of impurity"22 was thought to draw outrage from paternally trained male jurors and jurists. Lord Hale may consequently have cautioned well against this conditioned outrage and the resulting reactionary conviction of an accused. Similarly, legal scholars may well have feared that the burden of proof traditional to our system—that the defendant go free if any reasonable doubt remained as to his guilt—was upset in a trial for rape, where the natural sympathies of the judge and jury were thought to revolt against the accused.23

Yet as protective of the idealized "coy and modest female" as society was, so was it quick to condemn unseemly sexual activity by females. It was loathe to afford such women a forum to air what it feared to be often contrived or falsified charges of rape, charges which might well result in the accused's conviction and the imposition of extremely harsh punishments.24 Accordingly, nearly all jurisd-
dictions permitted the accused to claim that the prosecutrix con-
sented to the act and to support this claim by showing that it was
her custom to so assent. Thus the courts began to permit the intro-
duction of such evidence, reasoning, for example,

no court can overrule the law of human nature, which declares that
one who has already started on the road to prostitution would be
less reluctant to pursue her way, than another who yet remains at
her home of innocence. . . .

The Illinois Supreme Court clearly stated the theory upon which
the rule evolved:

The admissibility of all this class of evidence is placed upon the
ground that an unchaste woman would be more likely to consent
to the act than a virtuous one, and therefore her previous connec-
tion with the accused, or her general reputation for want of chast-
ity, are proper ingredients in determining the question of whether
the particular act in controversy was accomplished solely by force
or with her virtual consent.

In sum, the courts have permitted the introduction of such evi-
dence simply because they felt it was essential to the defense of the
falsely accused and probative of the matter in issue. "[I]t is more
probable that an unchaste woman assented to such an act than a
virtuous woman." Little or no consideration, however, was given
to the probative value of the evidence as against its prejudicial and
inflammatory side effects, both within the immediate context of the
trial and within the greater framework of society and the criminal
justice system. It is this failure which may make especially profita-
able a reevaluation of the rule, particularly in light of the social,
sexual and political realities of modern American society.

There appears to be little argument that evidence of a woman's
character for consensual sexual activity may have some tendency,
however slight, to show the likelihood of her consent to a later sex
act. However, the countervailing question for the jurist and law-

27. Sherwin v. People, 69 Ill. 55, 59 (1873).
29. The failure to balance the probative value and need against the harmful results of
admission of the evidence has been carried over into the Federal Rules of Evidence. Although
Fed. R. Evid. 403 provides for the exclusion of evidence determined to be prejudicial, confus-
ing, or a waste of time, Fed. R. Evid. 404 holds admissible without such balancing
"[evidence of a pertinent trait of character of the victim of a crime. . . ."
30. There is, however, a growing dissatisfaction with this conclusion. One article proposes
the following logically parallel cross-examination of the victim of a robbery:
maker must be whether that tendency is sufficiently strong to justify the introduction of evidence which will not only severely endanger the likelihood of obtaining a rational verdict based on the totality of the evidence, but also dissuade many reports of, and prosecutions for, rape by exposing the reputations and private lives of persons already subjected to severe trauma to the unfeeling scrutiny of the courtroom.

The principle at issue was clearly stated by Lord Chief Justice Coleridge in 1887:

> It has been held that evidence to shew that the woman has previously had connection with persons other than the accused, when she has denied that fact, must be rejected, and there are very good reasons for rejecting it. It should in my view be rejected, not only upon the ground that to admit it would be unfair and a hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial. The question in issue being whether or not a criminal attempt has been made upon her by A., evidence that she previously had connection with B. and C. is obviously not in point. It is obvious, too, that the result of admitting such evidence would be to deprive an unchaste woman of any protection. . . .

This dicta by the Lord Chief Justice was undermined and limited, however, by a statement in a concurring opinion that the holding did not impair "the right of the prisoner, on an indictment for rape or attempt to ravish, to give evidence that the woman was a common prostitute." It consequently had little perceptible impact on the development of the law, but rather stood as a mere restatement of the policy against admission of specific instances of the prosecutrix' previous consensual sexual activity. The broader concern raised by Lord Coleridge, however, has yet to be satisfactorily addressed. The point at issue in a trial for rape is not whether the prosecutrix has "had connection" with B. or C., nor whether she has

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"... Have you ever been held up before?"
"No."
"Have you ever given money away?"
"Yes, of course."
"And you did so willingly?"
"What are you getting at?"
"Well, let's put it like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure you weren't contriving to have your money taken...?"
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*The Legal Bias Against Rape Victims, 61 A.B.A.J. 464 (April 1975).*

32. *Id.* at 485 (Stephan, J., concurring).
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a reputation for such activity; it is whether the accused raped her. If the defendant asserts that she consented to the act, the issue then becomes whether she did so consent, but to that act only. Evidence of her reputation for consensual sexual activity with others may cast some light on the probability that she consented as alleged by the accused, but it cannot be deemed conclusive, or even highly persuasive.

While a woman who has chosen to engage in premarital or extramarital sexual activity with one or more partners may be marginally more likely to consent to additional sexual affairs, it is not at all certain, especially in today's society, that she is so disposed as to be indiscriminate in her choice of sex partners. Since recent studies have documented a marked increase in premarital sex, the likelihood that an unmarried rape victim will have engaged in sexual activity is substantially greater than in previous times. Therefore the probability that she will have a reputation for such conduct is also greater. Yet while these studies demonstrate no significant trend to indiscriminate sexual intercourse, the introduction of evidence of the prosecutrix' character for sexual activity may lead the jury to infer such indiscriminate sex. Indeed, even in cases in which consent is a questionable defense, the admission of such evidence has led juries to acquit on preconceived notions of contributory fault and a general hesitancy to convict for the rape of a person whom some jurors seem to consider "fair game."

These prejudicial counterfactors have been well documented. The University of Chicago's American Jury Project found a distinctive, if not surprising, pattern in jury verdicts in trials for forcible rape.

33. One study demonstrated that 65 percent of the unmarried female sample had engaged in intercourse at some time. Over 80 percent of that segment, however, had had intercourse with three or fewer partners. Oswald, Sexual and Contraceptive Behavior of College Females, 22 AM. COL. HEALTH ASS'N. J. 392 (1974).

A recent full-length book on the subject, while demonstrating an increase in premarital sex throughout the country, documents no significant tendency to indiscriminate sexual intercourse. M. Hunt, Sexual Behavior in the 1970's (1974).

34. Id.

35. See, e.g., H. Kalven, and H. Zeisel, The American Jury 70 (1966) [hereinafter cited as Kalven] and text accompanying notes 35 through 42 infra. For a limited legal reflection of this view, see the Model Penal Code §21.36 (a) (Prop. off. draft, 1962), proposing that defendants in statutory rape cases be given an absolute defense if it is shown that the victim was "sexually promiscuous," and failing to address the real issue at that stage: whether or not there was consent. See also note 42 infra.

36. Kalven, supra note 35, at 70.

It should be noted, of course, that the Jury Project does not isolate the effects of the introduction of character evidence only. The verdict pattern in rape cases may be substantially influenced not only by the introduction of character evidence, but also by jury hesitancy to impose stiff sentences for this crime and other similar factors.

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In the forty-two trials studied in which consent was likely to constitute a viable defense—trials in which there was neither extrinsic violence, multiple attackers, nor attack by a complete stranger—the jury returned guilty verdicts in only three instances. The trial judges reported they would have convicted in twenty-one of these same cases.\(^{37}\) In no other crime was this disparity in the verdict pattern so emphatic. The jury appears to redefine the crime of rape and adjusts its verdict to take into consideration what it feels is contributory fault on the part of the victim.\(^ {38}\) This jury determination of fault is not limited to what might be termed provocative behavior on the part of the prosecutrix, but extends to previous bad character.\(^{39}\) One of the verdicts reported to the Project clearly illustrates this factor:

In another case the jury’s reaction is equally disturbing. Again the rape appears to have been brutal. Three men kidnap a girl from the street at 1:30 in the morning, take her to an apartment, and attack her. The judge states:

"It developed that the young unmarried girl had two illegitimate children; also defendant claimed she was a prostitute."

He calls the verdict [not guilty] a "travesty of justice."\(^ {40}\)

The Jury Project documents another related area of jury hesitancy to convict. In prosecutions for violations of laws which the community considers to be ill-advised or which are otherwise unpopular, juries produce substantially lower rates of conviction.\(^ {41}\) In a society which produces some jurors who wonder whether rape, especially of a promiscuous woman, should be a crime at all,\(^ {42}\) there can be little question that introduction of a prosecutrix’ previous sexual reputation can make successful prosecution and rational disposition of rape cases impossible.

\(^{37}\) Id. at 253.

\(^{38}\) Where a young defendant is charged with raping a seventeen-year-old girl and the jury acquits, the judge explains bluntly:

"A group of young people on a beer drinking party. The jury probably figured the girl asked for what she got."

Id. at 249-50.

\(^{39}\) Id. at 254.

\(^{40}\) Id. at 251.

\(^{41}\) Id. at 286-93.

\(^{42}\) See, e.g., an interview with a juror: "[T]he guy's not trying to kill her. He's just trying to give her a good time." N. Blitman and R. Green, Inez Garcia on Trial, Ms., May, 1975, 49 at 86.

\(^{43}\) 1 Wigmore § 63; 6A C.J.S. Assault and Battery §43 (1975); cf. Cannon v. People, 141 Ill. 270, 30 N.E. 1027 (1892).
Self-Defense: An Analogy?

A similar problem may be thought to arise under a rule sometimes considered to be parallel to that under consideration: the introduction in a trial for homicide of evidence to show the victim's character for violence. Generally, such evidence may be introduced when a viable issue develops as to whether the deceased was in fact the aggressor. Evidence of the victim's character for violence or "turbulence" is admissible to show the probability of the deceased's action.43 Professor Wigmore, however, is uncomfortable with this rule, and explicitly cautions against the indiscriminate use and introduction of such evidence:

There ought, of course, to be some other appreciable evidence of the deceased's aggression, for the character-evidence can hardly be of value unless there is otherwise a fair possibility of doubt on the point; moreover, otherwise the deceased's bad character is likely to be put forward and serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often feasible to obtain untrustworthy character testimony for that purpose.44

There are several factors worth noting, not only in Wigmore's description of and caveat to the rule, but also as to the suitability of its parallel with the principal rule in question. Professor Wigmore accepts the evidence of a homicide victim's character for violence as offering some probative value once a "fair possibility of doubt" is established on the point. This language indicates a demand for a foundation, a primary corroboration before allowing the introduction of matter concerning reputation.45 He is keenly suspicious of abuse of the evidence, and proposes that it be carefully used, else the defendant be improperly acquitted by a jury which may feel that the killing of such an evil character should not be punished. He further cautions that it is possible to obtain untrustworthy and falsified evidence and that such possibility be kept in mind by the judge. No like concern, however, is shown in his treatment of the rule in consent defense rape trials. As in the cases themselves, Professor Wigmore ignores the danger of the improper use and introduction of evidence of a woman's previous bad character for chastity.

43. 1 Wigmore § 63, at 469-70.
44. The nature of this foundation, however, has been only obscurely defined by the courts. In Illinois the testimony of the defendant alone seems to have been determined sufficient foundation for the introduction of the evidence. People v. Gibson, 385 Ill. 371, 378, 52 N.E.2d 1008, 1011 (1944).
He disregards the prejudicial side effects of such introduction.\textsuperscript{46} Yet, as the Jury Project demonstrates, the introduction of evidence of prosecutrix’ character results in substantial prejudice to the conduct of a rational trial.\textsuperscript{47} Moreover, evidence of a deceased’s reputation generates none of the detrimental extrajudicial side effects produced by reputation evidence in a trial for rape. Clearly the possibility of the introduction of the deceased’s bad character is likely to result in no marked disincentive to reports and prosecutions of the crime similar to that resulting in rape cases.\textsuperscript{48}

It is also clear that the parallel itself is subject to serious question. Evidence concerning the violent character of the deceased in a homicide case may be indispensable to and irreplaceable in the accused’s defense when there are no credible eyewitnesses.\textsuperscript{49} Evidence of the prosecutrix’ promiscuous character in a rape case is not so essential: in the former, the deceased is, of course, not available for cross-examination and impeachment at trial.\textsuperscript{50} The prosecutrix’ availability for cross-examination renders the major policy concerns behind the introduction of character evidence in the homicide trial inapplicable to a trial for rape: the judge and jury will be able to evaluate

\begin{footnotes}
\footnote{46. 1 Wigmore § 63.}
\footnote{47. For further discussion see text accompanying notes 35 through 42 supra.}
\footnote{48. That such a disincentive exists in rape cases cannot be seriously contested. The Illinois House of Representatives Rape Study Committee concluded that “[O]ne of the major problems concerning the crime of rape is the low incidence of reporting of this crime (estimated at 10% of total rapes committed).” It determined that this low report rate resulted chiefly from the victim’s reluctance to “suffer further personal embarrassment and social stigma” and fear of “certain unpleasant court procedures permitted the offender in his defense... .” \textit{Report to the House of Representatives and the 78th General Assembly of the State of Illinois}, at 42. December, 1974.}
\footnote{49. This disincentive was remarkably demonstrated by a police training officer in his testimony before that Committee. A portion of his police training course concerns police procedure in rape cases.}
\footnote{I end my discussion of rape investigation with the question that if the officers had their wives, or if their wives had been raped, would they report it to the police? Over fifty percent say, no, they wouldn’t. Testimony of Greg Conner, a police training officer at the University of Illinois. \textit{Rape Study Hearing, supra} note 9, at 108.}
\footnote{49. It is interesting to note, however, that not only have the Illinois courts begun to look with suspicion on the introduction of this evidence, see, e.g., People v. Gill, 7 Ill. App. 3d 24, 286 N.E.2d 516 (1972), but have in one case limited it to evidence of the victim’s prior violent acts toward the accused only. People v. Peeler, 12 Ill. App. 3d 940, 299 N.E.2d 382 (1973).}
\footnote{50. Professor Wigmore apparently confines the rule concerning introduction of evidence of a victim’s character for violence to those cases in which the victim is deceased, and cannot be present at trial. A few jurisdictions have extended the admissibility of such evidence to trials for assault, when a material issue is raised as to which party was the aggressor. 1 Wigmore § 63. Although both 6A C.J.S. \textit{Assault and Battery} §43 and an annotation at 1 A.L.R. 3d 571 (1965) flatly state this to be the rule, those references cite cases from far fewer than a majority of the jurisdictions.}
\end{footnotes}
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her demeanor and credibility. The parallel is inaccurate. The policy concerns of these rules are not identical, and since no common need for the evidence is established, they cannot be said to be analogous. The rules merely admit similar evidence in dissimilar situations.

This recognition, together with the realization that the prejudicial effects in a rape trial are at least as great as in a homicide case and that the extrajudicial counter effects are substantially more damning, necessarily dictates a change in the rule.

CONSTITUTIONAL IMPLICATIONS

It is necessary to consider the constitutional dimensions of any proposal which limits the content of an accused's defense or which constricts the scope of his cross-examination. Two specific constitutional concerns are raised: the accused's fourteenth amendment right to due process and his sixth amendment right to confront the witnesses against him.

Due Process

The United States Supreme Court in Chambers v. Mississippi defined the right of due process to be "in essence, the right to a fair opportunity to defend against the State's accusations." It recognized, however, that this right is not without limit:

[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

51. See text accompanying notes 35 through 42 supra.
52. For further discussion see note 48 supra.
53. See text accompanying notes 35 through 42 supra. See also, with regard to evidence of a defendant's character, but with language and logic sufficiently general to cast light on the topic in question, Michelson v. U.S., 335 U.S. 469, 475-76 (1948):

The inquiry [into defendant's character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

54. The following discussion focuses on cases arising under the federal constitution. The Illinois Constitution, in art. I. §§ 2, 8 (1970), contains identical protection in substantially the same language.
55. U.S. Const. amend. XIV, § 1: "... nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."
56. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."
58. Id. at 302.
In *Chambers*, the Court decided that a trial court’s failure to provide the defendant an exception to the hearsay rule, and thereby excluding evidence “critical” to his defense, together with its refusal to permit him to cross-examine a witness who had testified adversely, “denied him a trial in accord with traditional and fundamental standards of due process.”

The Court, however, took care to examine the competing interests asserted, and reached its decision only after finding that the balance of those interests tipped greatly in favor of the defendant. It determined that not only was the evidence excluded “critical to Chamber’s defense,” but “under the facts and circumstances of this case,” the rational state interests asserted were not defeated by the admission of such evidence. Mississippi had asserted two interests in the exclusion: its longstanding “voucher” rule, and the rule against admission of hearsay. The Supreme Court found the “voucher” rule to be a “remnant of primitive English trial practice... bear[ing] little present relationship to the realities of the criminal process.”

The Court then evaluated the lower courts’ refusal to extend an established exception to the hearsay rule—that admitting declarations against pecuniary interest—to the circumstances of the *Chambers* case. The Court found that this refusal was not necessary to protect the State’s interest in excluding perjured and unreliable testimony:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. . . . In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

The Court, however, cautioned against overbroad interpretation of its holding:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and cir-

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59. Id.
60. Id.
61. Id. at 303.
62. Id. at 296.
63. Id. at 302.
cumstances of this case the rulings of the trial court deprived Chambers of a fair trial.\textsuperscript{64}

Relying on this caveat, circuit courts facing similar questions after the decision in \textit{Chambers} have not followed that case, but, instead, have distinguished it as based upon exceptional facts.\textsuperscript{65} All have properly deemed it necessary to examine and balance the interests asserted. However, absent the lopsided balance present in \textit{Chambers}, they have found no deprivation of due process.\textsuperscript{66}

The Illinois courts have likewise examined and rejected contentions that state evidentiary and procedural exclusions have violated due process under the \textit{Chambers} holding:

The relevancy and reliability of the proffered evidence are vital factors and must be considered before finding that the evidence was improvidently excluded under the \textit{Chambers} rule. Therefore when this rationale and the precept that the integrity of the truth-finding function of the trial must be protected are applied to the case at bar, it appears that the trial court's rulings were proper.\textsuperscript{67}

There is clearly no constitutional requirement that the defendant be permitted to make his case in any and every manner possible. His absolute right to introduce evidence extends only so far as such evidence reliably tends to demonstrate his innocence without irreversibly interfering with the rational conduct of the trial. When his proffered evidence threatens to violate the substantial state interests in the rational and fair conduct of trial, a balance must be struck. \textit{Chambers}, and the cases decided after it, hold only that such evidence must be admitted when the balance is tilted definitively in favor of the defendant: when it is clear that the rejected evidence is crucial to the accused's rational defense and that the State can demonstrate no substantial and rational interest requiring its exclusion.

This article concerns a proposed evidentiary exclusion that presents no such skewed balance. Evidence of a prosecutrix' reputation for chastity is only marginally reliable and extremely damaging to fair trial conduct.\textsuperscript{68} It is, additionally, not essential to an accused's

\textsuperscript{64} Id. at 302-03.
\textsuperscript{65} See, e.g., U.S. v. Harris, 501 F.2d 1, 7 (9th Cir. 1974); U.S. v. Issacs, 493 F.2d 1124, 1155 (7th Cir. 1974); U.S. v. Walling, 486 F.2d 229, 238-39 (9th Cir. 1973).
\textsuperscript{66} Id.
\textsuperscript{68} See notes 35 through 42 \textit{supra} and accompanying text.
rational defense. Even if evidence of a woman’s bad character for chastity is ruled inadmissible, the accused still has available cross-examination and impeachment to cast doubt on the prosecutrix’ claimed lack of consent, and to show a possibility for bias by revealing a previous relationship with the accused. Evidence may be introduced to impeach the prosecutrix by showing her bad character for truth and veracity. Her testimony may be attacked as being not “clear and convincing.” Other evidence may be adduced to show motive for false accusation. The woman so deeply feared by the common law, she who maliciously constructs a tale of rape to persecute an unfaithful suitor, to avenge some real or imagined wrong, or for some reason of mental imbalance, will likely be impeached or exposed in this manner. The jury will be able to observe her demeanor and comportment and will give weight to her testimony accordingly.

Indeed, any perceived due process objection appears to be grounded more in history than in the Constitution. The Advisory Committee Note to Federal Rule of Evidence 404 recognizes that the basis for the rule “lies more in history and experience than in logic” but urges that “an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations.” Uneasy with this “justification,” the Advisory Committee extended its apologia:

In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

This justification once again fails to address the question as to the rule admitting evidence of a prosecutrix’ character. That question, from a constitutional due process perspective, must be whether the evidence is substantially helpful to the accused’s defense on the merits, without destroying the rational forum necessary to the administration of justice.

69. If her testimony is not clear and convincing, the conviction cannot stand unless it is otherwise supported by corroborative evidence. People v. White, 26 Ill. 2d 199, 186 N.E.2d 351 (1962); People v. Porter 13 Ill. App. 3d 893, 300 N.E.2d 814 (1973).
70. 3A WIGMORE §924(a).
71. Even in the psychological case studies cited by Wigmore in support of his proposition that some women are pathological liars and tend to vent their maladjustment in false accusations of sexual misconduct, he notes that they have a bad reputation for veracity as well, id. at 741-44. Properly, therefore, it would be evidence, if any, of her poor reputation for veracity, not evidence of sexual misconduct, which belongs in the balance of the jury’s decision.
72. FED. R. EVID. 404, Advisory Committee Comment.
73. Id.
A law providing for the exclusion of evidence of a prosecutrix' reputation for consensual sexual activity presents little difficulty under the Chambers holding. The evidence excluded by such a law is demonstrably of dubious probative value and leads to grossly unbalanced verdicts.

**Confrontation**

The sixth amendment provides an accused the right to be confronted with the witnesses against him. The policy behind this provision is, according to Wigmore, two-faceted:

(1) The main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination. 

(2) There is . . . a secondary advantage to be obtained by the personal appearance of the witness; the judge and jury are enabled to obtain the elusive and uncommunicable evidence of a witness' deportment while testifying. 

The United States Supreme Court has reaffirmed this position: “cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” Only a few cases speak specifically to the effect of a limitation placed upon the scope of cross-examination or impeachment. In Davis v. Alaska, the Court addressed itself specifically to this constitutional issue and held that such a limitation on the scope of cross-examination and impeachment can be violative of the confrontation clause. Before so holding, however, the Court as it had in Chambers carefully balanced the asserted state interest against the value and nature of the evidence excluded. At trial, the defense counsel had attempted to show a key witness' bias by revealing the witness' juvenile record. The judge prohibited the introduction of

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74. 5 Wigmore § 1395 (Chad. rev. 1974).
76. The bulk of litigation on the clause has concerned the introduction at trial of written depositions, transcripts of prior sworn testimony, or certain hearsay evidence. See, e.g., Pointer v. Texas, 380 U.S. 400 (1965). In such cases, the Court has invariably found that absent a showing that the testimony or evidence in question was secured only upon adequate opportunity for cross-examination, its introduction will unconstitutionally deprive the defendant of his right to cross-examine the witnesses against him. See, e.g., Douglas v. Alabama, 380 U.S. 415 (1965); cf. Pointer v. Texas 380 U.S. 400, 405 (1965):

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

78. Id. at 315-20.
such evidence, asserting the state interest in preserving the anonymity of juvenile records. The Supreme Court reversed, holding simply that "[i]n this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender."\textsuperscript{79}

The Court examined the evidence excluded and found that it was essential and rationally helpful to the defendant's case. Only upon this examination and finding, and only after deprecating the state interest asserted—the "temporary embarrassment" of the witness—did the majority of the Court declare the error to be of constitutional magnitude requiring reversal.\textsuperscript{80}

A decision as to the constitutionality of a limitation on the scope of defense counsel's cross-examination and impeachment, therefore, will again require a balance between the accused's right to make his defense and the asserted state interest. If a defendant is prohibited from presenting evidence "critical" to his defense\textsuperscript{81} or from rationally attacking "key elements" of the state's case,\textsuperscript{82} serious constitutional questions will be raised, and will not likely be overcome absent a showing of a substantial state interest in the exclusion. As has been earlier noted, however, the exclusionary rule proposed by this article presents little danger of failing this balancing test: the evidence to be excluded is neither crucial nor rational, and the state interest in its exclusion is indeed substantial.\textsuperscript{83}

\textbf{PROPOSALS FOR CHANGE}

The law's traditional distrust of the jury in rape cases and its fear...
of reactionary, hasty, and unjust convictions has not been proven out in modern practice. According to the American Jury Project, an accused rapist stands a 50 percent better chance of acquittal than the average criminal defendant. While the basic pattern in all criminal cases is that a jury will acquit in 30 percent and a judge acquit in 17 percent, in rape cases a jury will acquit in over 43 percent and a judge in 29 percent. Yet these cases have already gone through a process designed to discover false accusations and reject weak cases. This preliminary screening is much more stringent than that involved in any other crime. Between 15 and 50 percent of all reported rapes are judged by police to be "unfounded" and are not further pursued. Prosecutors are known to pursue only those rape cases which appear to present an especially strong possibility of conviction. It is in these strongest cases that juries and judges alike acquit in such markedly higher percentages. There is little evidence that either the judge or the jury is likely to leap to the rigorous and unthinking defense of the prosecutrix at the expense of the falsely accused. Neither the judge nor the jury has abandoned the presumption of the defendants' innocence in rape trials. They can therefore be relied upon to refrain from Lord Hale's imagined righteous and wrathful convictions, to observe the prosecutrix carefully, to attend to the cross examination, and to convict the accused only when proper: when the state has proven his guilt beyond a reasonable doubt.

In recognition of the foregoing, and of the problems arising from the introduction of evidence of a prosecutrix' previous character for chastity, several states have begun to reconsider the rule. Statutes

84. See text accompanying notes 5 through 11 supra.
85. Kalven, supra note 35, at 33 and 70.
86. Id. at 70.
87. As to police screening, see, e.g., note 10 supra. See also the testimony of Ronald A. Johnson, the Chief of the Bolingbrook Police Department:

The problem we have in rape is the State's Attorney's Office. Because they have an overburden of cases, they enter what they call "plea bargaining." First off, they want to know all the facts and the background of the victim. They want to know if she is divorced, single, fools around, where the rape takes place, did she go with the guy to a bar, and some of these elements are in the cases. And the State's Attorneys will say, "Well, let's change the case to assault and battery" or whatever the case is.

Rape Study Hearing, supra note 9, at 20.
90. Id. at 25. See also note 87 supra.
91. Revolt against Rape, Time, October 13, 1975, at 48.
substantially prohibiting the introduction of such evidence have been enacted into law in California and Michigan. The 1974 California Robbins Rape Evidence Law provides that in a trial for rape, evidence of the prosecutrix' previous sexual character, reputation, or conduct with other than the accused is absolutely prohibited when used to show consent. The accused may introduce evidence of the prosecutrix' character or reputation for chastity only to rebut such evidence previously introduced by the prosecution.

Evidence of previous sexual conduct used to attack credibility may be admitted only after a written motion and offer of proof is made by the defendant, and this proof is tested outside the presence of the jury by questioning the complaining witness. Only if the trial judge determines the offered evidence probative and not unduly prejudicial may it be introduced.

The Michigan statute, part of a 1975 omnibus rape law reform act, provides a different approach. The general rule there established, that no evidence of the prosecutrix' sexual conduct may be admitted, is excepted only after an in camera hearing preceded by a written defense motion. A judicial finding that the proposed evidence is "material to the fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value" is required before evidence of the prosecutrix' previous conduct with the accused or evidence of specific acts to show the source of semen, pregnancy or disease may be introduced.

The noteworthy difference between these laws is their respective method of dealing with evidence of the prosecutrix' prior sexual activity with the accused. The Michigan law explicitly requires a finding that such proposed evidence is more probative than prejudicial. The California law is silent on the point, apparently leaving in effect existing common law on the subject. Such evidence is not, therefore, likely subject to such a balancing test. On the other hand, the Michigan law is silent as to the use of such evidence for impeachment, while the California law outlaws the use of such evi-

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95. Id. § 1103 (2)(c).
96. Id. § 782 (a).
98. Id.
99. Id.
100. Id.
Evidence except upon a finding as to its value. Despite these differences, the major effect and intent of the two statutes are the same; the policy decision has been made that it is consistent with adjudication on the merits of each case to disallow evidence of prior consensual sexual relations of the plaintiff with persons other than the defendant. It seems quite evident that women who have active sex lives deserve as full protection of the law as ‘chaste’ women. The act of rape is as wrong against a prostitute as a virgin. The key to the prosecution should be the facts of the alleged incident, not the sexual habits of the complainant. In cases of sexual assault, the assault itself should be the focus, not the act of sex; evidence of assault in the particular instance should not be made suspect just because of prior sexual activity by the plaintiff.

The Illinois General Assembly is currently considering two proposals for change in the present rule. One, House Bill 382, as amended, prohibits the introduction of all evidence of the prosecutrix’ previous sexual conduct with other than the accused, unless an offer of proof is made. The trial judge may allow introduction of such evidence only after determining ‘the relevancy and, therefore, the admissibility of such evidence.”

102. MEMORANDUM TO GOVERNOR WILLIAM G. MILLIKEN, MAY 1, 1974, FROM THE OFFICE OF CRIMINAL JUSTICE PROGRAMS, MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET.
103. HOUSE BILLS 274 and 382, 79th GENERAL ASSEMBLY, STATE OF ILLINOIS (1975). Both bills have passed the House of Representatives by substantial margins and await action in the Senate Judiciary Committee.
104. HOUSE BILL 382, 79th GENERAL ASSEMBLY, STATE OF ILLINOIS (1975), sponsored by Rep. Hirschfeld, reads:

In any prosecution for rape under Section 11-1 of the Criminal Code of 1961, approved July 28, 1961, as amended, or for assault with intent to commit, attempt to commit, or conspiracy to commit the crime defined in such Section, opinion evidence, reputation evidence, and evidence of specific instances of the victim’s sexual conduct, or any of such evidence, is not admissible in order to prove consent by the victim unless ruled admissible by the trial judge after an offer of proof has been made as provided in this Section. An offer of proof of opinion evidence, reputation evidence, and evidences of specific instances of the victim’s sexual conduct may be made by the defense attorney in the case in the trial judge’s chambers for the purpose of permitting the judge to determine the relevancy and, therefore, the admissibility of such evidence. This Section shall not be applicable to evidence of the victim’s sexual conduct with the defendant.

This bill, although apparently intended to limit the common law admissibility of evidence of a rape victim’s promiscuity, opens the possibility for the admission of evidence long excluded at common law. Upon a finding of relevancy, the court may permit the introduction not only of “opinion evidence [and] reputation evidence,” but “evidences of specific instances of the victim’s sexual conduct” as well. [emphasis added] Id.

105. Such determination must be made out of the presence of the jury. Id.
The second bill, House Bill 274, 106 is a product of the Rape Study Committee of the Illinois House of Representatives. 107 The bill absolutely prohibits the introduction of all evidence of the prosecutrix’ previous sexual conduct with other than the accused.

Both Illinois bills leave intact the present admissibility of evidence of the prosecutrix’ previous sexual relations with the accused. They do not adopt the position of the Michigan law which requires some finding that the probative value of such evidence outweighs its inflammatory or prejudicial nature. This approach, much like the common law rule, fails to balance the crucial effects of this evidence.

There are two significant differences between the two proposals. House Bill 382 will permit the introduction of all evidence of the prosecutrix’ bad character for chastity merely upon a finding of relevancy by the trial judge. 108 Such a rule, without an explicit legislated balancing requirement, does not adequately address the concerns raised about the common law standard. Trial judges, conditioned by years of the automatic admissibility of such evidence, will likely have little question that such evidence is “relevant” and will accord it admission. 109 Secondly, the very nature of the required finding merely propagates the common law’s failure to consider both the probative value and the prejudicial side effects of such admission. House Bill 382 provides only that the trial judge determine the evidence to be relevant. It does not require a finding that the proposed evidence is of significant probative value or that the


Section 115-7 is added to the “Code of Criminal Procedure of 1963”, approved August 14, 1963, as amended, the added Section to read as follows:

(Ch. 38, new par. 115-7)

Sec. 115-7 Past Sexual Conduct as Evidence in Trials of Rape. No record, whether written, oral, or otherwise, regarding the past sexual conduct of a rape victim, shall become admissible as evidence in a criminal proceeding against a defendant charged with rape, except such records as concern the past sexual conduct of the victim with the accused.

This bill is too sparingly drafted. It makes no mention, for instance, of trials for attempted rape. There is one additional concern: the use of the term “record” may, since it carries connotations of some formality, cause confusion or less than blanket application of the statute.

107. The Rape Study Committee was formed by House Resolution 355, 78th General Assembly, State of Illinois (1973), to study and formulate proposals for reform of Illinois rape law.

108. The full text of the bill is set forth in note 95 supra.

109. Common law precedent, of course, will uniformly hold such evidence relevant. Simi-
Evidence of Consent

Evidence of Consent

probative value outweighs the prejudicial side effects of the introduction. In this respect, House Bill 382 simply vests additional discretion in the trial judge. While this may be a step towards a rational policy, it offers minimal guidance as to the requirements of the finding, nor does it establish a considered weighing of the factors involved or any significant presumption against the admissibility of the evidence.

Additionally, House Bill 382 establishes this frail protection only if the evidence is offered "to prove consent by the victim." A narrow construction of this language might well permit the automatic admissibility of such evidence if offered, not to "prove consent," but to impeach the prosecutrix' allegations of nonconsent.110

House Bill 274, on the other hand, absolutely prohibits introduction of evidence concerning the prosecutrix' sexual activity with other than the accused.111 This prohibition is in keeping with the establishment of a rational policy and with the tenor of the legislative changes in Michigan and California.

While House Bill 274 substantially satisfies the concerns addressed in this article, it fails to require a trial court finding that evidence of the prosecutrix' previous sexual conduct with the accused is more probative than prejudicial. While such a finding would almost always be made, the inclusion of such a required balancing would take Illinois one step further toward the adoption of a comprehensive rational rule of evidence in rape trials. The following draft statute contains such a provision and clarifies other aspects of the proposed change.

**Evidence of Past Sexual Conduct in Trials for Rape.**

In any criminal proceeding for rape under Section 11-1 of the Criminal Code of 1961, approved July 28, 1961, as amended, or for assault with intent to commit, or conspiracy to commit the crime defined in such Section:

(1) No evidence of specific instances of the complaining witness' sexual conduct, opinion evidence of the complaining witness' sexual conduct, or reputation evidence of the complaining witness' sexual conduct.
sexual conduct shall be admitted, except as provided in paragraph 2 of this Section.

(2) Evidence of the complaining witness' past sexual conduct with the accused or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, may be admitted only to the extent that the judge finds that such proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Such a finding shall be made by the judge only upon a written motion and offer of proof filed by the defendant. The court may order an in camera hearing to assist in its determination.

SUMMARY AND CONCLUSION

The law, in order to maintain its meaning and viability, must necessarily be subject to periodic review and reevaluation. Old principles of law based on societal conditions and assumptions no longer relevant to modern society must be reexamined and, if no longer viable, discarded or revised.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists for blind imitation of the past.112

The rule of evidence holding admissible in a rape case evidence of the prosecutrix' character for chastity is one such rule. Change is necessary in order to ensure a more rational conduct of such trials and the progress of our criminal justice system.

JAMES J. WESOLOWSKI

112. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).